IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.11.2006

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.308 of 2001

G.Ramalingam .. Appellant/ Plaintiff

-Vs-

T.Vijayarangam .. Respondent/ Defendant

APPEAL against judgment and decree of the Sub-Court, Arni in A.S.No.10 of 1998 dated 25.09.2000 in confirming the judgment and decree of the Additional District Munsif, Arni in O.S.No.170 of 1996 and dated 18.06.1997.

For Appellant : Mr. V.Raghavachari
For Respondent : Mr. P.Valliappan

J U D G M E N T

The unsuccesful plaintiff in O.S.No.170 of 1996 on the file of the Additional District Munsif, Arni is the appellant in the above second appeal.

2. For the sake of convenience the parties are referred to as per their ranking in the suit.

3. The case of the plaintiff in brief is as follows:-

The plaintiff and defendant are brothers; the defendant under an agreement of sale dated 26.12.1990 agreed to sell the suit properties to the plaintiff for a consideration of Rs.19,000/-; an advance of Rs.6,000/- was paid on the same day, the plaintiff was having the balance amount of Rs.13,000/- and had always been ready and willing to perform his part of the contract, due to the pendency of a partition suit in O.S.No.105 of 1984 between the plaintiff, defendant and others, the matter was dragging and ultimately the properties were allotted to the share of the defendant; because of the uncertainity regarding the allotment of these properties to the defendant, the defendant could not convey the property to the plaintiff and now the properties have been allotted to the share of the plaintiff for which he can have no excuses; for the legal notice sent by the plaintiff a reply was sent containing false averments and hence the suit for specific performance.

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4. The suit was resisted by the defendant by filing a written statement with the following defence:-

The agreement is admitted and as per the agreement the plaintiff has to pay the full consideration within 25.03.1991 but the plaintiff failed to pay the balance sale consideration within the stipulated time and get the sale deed executed, time is the essence of the contract and hence the advance amount is forfeited. It was further contended that the defendant was ready to perform his part of the contract but the plaintiff was not prepared to pay the balance sale consideration for 2½ years from the date of agreement hence the plaintiff cannot ask for advance amount; the defendant sustained loss because of the breach committed by the plaintiff; the property value has considerably increased and the suit is liable to be dismissed with exemplary costs.

5. The following issues were framed by the trial court namely:-

(i) Whether the agreement has become unenforceable because of the failure of the plaintiff to pay the amount before 25.03.1991 as per the suit agreement?
(ii) Whether the plaintiff cannot claim refund of the advance amount?
(iii) Whether the plaintiff has committed breach?
(iv) Whether the plaintiff is entitled for specific performance?
(v) To what other reliefs the plaintiff is entitled?

6. During trial the plainatiff got himself examined as P.W.1 and marked Exs.A-1 to A-13. On the side of the defendant, the defendant was examined as D.W.1 and Ex.B-1 was marked. On a careful consideration of the oral and documentary evidence adduced in the case the trial court rejected the prayer for specific performance but granted the relief of refund of the advance money. Being aggrieved by that the plaintiff filed an appeal in A.S.No.10 of 1998 before the Sub-Court, Arni but the lower appellate court also dismissed the appeal and being aggrieved by that the above second appeal has been filed.

7. When the appeal came up for admission on 22.03.2001 notice of motion had been ordered and in response to that the respondent had entered appearance through his counsel and thereafter the above second appeal is listed for hearing now.

8. Heard Mr. V.Raghavachari learned counsel appearing for the appellant and Mr. P.Valliappan learned counsel appearing for the respondent.

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9. Mr. V.Raghavachari learned counsel appearing for the appellant submitted that the Courts below have erred in holding that time is of the essence of the contract when the settled principle of law is that time is not of the essence of the contract in the case of immovable property. The learned counsel further submitted that there is absolutely no pleading and no evidence to establish that in this case time is of the essence of the contract. The learned counsel further submitted that both the Courts below in the absence of averments in Ex.A-4-reply notice and in the plaint have accepted the case of the defendant that the sale agreement-Ex.A-1 was entered into to raise money for the marriage of his son. The learned counsel further submitted that admittedly when the parttion suit was pending between the parties and the defendant had not been given a specific share on the date of the aggrement and the right in respect of the property had been declared and possession handed over only in E.P.No.30 of 1993 the Courts below have erred in holding that the plaintiff is not entitled to the relief of specific performance on account of delay. The learned counsel submitted that the defendant filed an application in E.A.No.30 of 1993 in O.S.No.105 of 1984 to further drag on the proceedings even though the compromise decree was passed on 31.07.1991 and because of that and also considering the fact that the defendant is the brother, the plaintiff did not immediately take any steps to get the sale agreement enforced legally. He further submitted that since the time was running out the plaintiff caused Ex.A-2-legal notice dated 28.09.1993 and as the time for filing the suit was to expire, though E.A.No.30 of 1993 filed by the defendant was pending, the suit was filed on 04.02.1994. The learned counsel further submitted that after Ex.A-4-reply notice was received in October 1993 the suit has been filed within three months and hence it cannot be said that there was unreasonable delay in filing the suit. The learned counsel further submitted that the Courts below by overlooking Ex.A-9 have erroneously held that the plaintiff was not possessed of sufficient funds and he was not always ready and willing to perform his part of the contract. The learned counsel further submitted that the defendant had not pleaded in the written statement that the plaintiff was not having the means and funds to pay the balance sale consideration and as such the finding of the Courts below that the plaintiff was not having sufficient funds to complete the sale transaction is not correct. In support of his contention that 'the time is not of the essence of the contract' he relied upon the judgment of the Apex Court reported in A.I.R. 1993 S.C. 1742 (Smt. Chand Rani Vs. Smt. Kamal Rani).

10. Per contra the learned counsel appearing for the respondent submitted that both the Courts below on a careful considration of Exs.A-1, A-12 and the oral evidence on record have held that time is of the essence of the contract. The learned counsel for the respondent submitted that Ex.A-12 shows that the

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defendant was in need of funds and that is the reason why he entered into Ex.A-1-sale agreement and the time for completion of the sale was fixed as three months and admittedly the marriage of the defendant's son was performed within 6 months from the date of Ex.A-1 and from these circumstances it could be inferred that time was of the essence of the contract. The learned counsel further submitted that the agreement was entered into only after fully knowing that the partition suit was pending and further there is absolutely no explanation on the part of the plaintiff for his inaction during the period between 31.07.1991, the date of the final decree passed in the partition suit pursuant to the filing of the joint compromise memo and 27.01.1993 when E.A.No.30 of 1993 was filed. The learned counsel further submitted that unless the plaintiff establishes that he was ready with money to complete the sale at all stages of the contract the plaintiff is not entitled to get a decree for specific performance. He further submitted that when the Courts below have on a thorough analysis of the evidence on record have come to the conclusion that the time is of the essence of the contract and the plaintiff was not always ready and willing to perform his part of the contract and he has not explained the long delay in approaching the Court and when no substantial question of law arises for consideration in the above appeal, this Court may not interfere with the concurrent findings of fact arrived at by the Courts below. In support of his submissions the learned counsel relied upon the following decisions:-

(i) A.I.R. 2003 Andhra Pradesh 535 (D.B.) (Nalamathu Venkaiya (deceased by L.R. and another Vs. B.S.Neelkanta),
(ii) A.I.R. 2001 Madras 127 (Indravathi Vs. Kamala) and
(iii) A.I.R. 2004 Madras 457 (D.B.) (K.Majeed Vs. Pappa alias Madurambal and another).

11. From the above submissions the following points arise for consideration:-

(1) Whether the finding of the Courts below that time is of the essence of the contract is sustainable?

(2) Whether the findings of the Courts below that the plaintiff was not always ready and willing to perform his part of the contract is correct and hence the plaintiff is not entitled for a decree for specific performance is correct?

12. To decide the first point it will be useful to refer to the decision relied upon by the learned counsel for the appellant reported in A.I.R. 1993 S.C. 1742 (referred to supra). In Paragraph 24 of the decision it is laid down as follows:-

> "24. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being

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the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example: the object of making the contract."

In the above legal background, if we look at the terms of Ex.A-1-sale agreement it could be seen that there is no clause in the agreement which leads to the inference that the parties wanted to treat time as the essence of the contract. Therefore we have to see whether there are surrounding circumstances like the object of making the contract to come to the conclusion as to whether the time is of the essence of the contract. As rightly contended by the learned counsel for the appellant though it was the case of the defendant before the trial court that Ex.A-1-sale agreement was entered into mainly for the purpose of raising funds for performing the marriage of his son, such a plea has not been put forth either in Ex.A-4-reply notice or in the plaint and it is also conceded that in Ex.A-12 also it is not stated so. Though it is stated in Ex.A-4-reply notice that the defendant entered into the agreement for the reason to solve the financial problems within three months, from that it cannot be inferred that the defendant executed the sale agreement only to raise the funds to perform the marriage of his son. From the evidence adduced in the case it could be seen that no compelling circumstances have been established to draw an inference from those circumstances that the parties intended to treat time as the essence of the contract. The facts of the case in A.I.R.2001 Madras 127 (referred to supra) are totally different and hence the same is not applicable to the facts of the instant case. Similarly in A.I.R. 2005 Andhra Pradesh (referred to supra) considering the specific terms contained in the agreement entered into between the parties to the suit the Division Bench held that time is the essence of the contract. The terms and conditions contained in the agreement pertaining to that case are totally different from the terms and conditions contained in Ex.A-1 in this case and hence the said decision is not applicable to the facts of this case. Therefore in the considered view of this Court, the courts below are not right in holding that time is of the essence of the contract in the instant case.

13. For deciding the second issue as to whether the courts below are right in refusing specific performance of the contract it will be useful to refer to the law laid down in the following decisions:

(i) N.P.Thirugnanam Vs. R.Jagan Mohan Rao, A.I.R. 1996 S.C.116 (para 5)

"Right from the date of the execution till date of

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the decree he must prove that he is ready and has always been willing to perform his part of the contract."

(ii) Jugraj Singh Vs. Labh Singh, A.I.R. 1995 S.C. 945 (para 3)

"(A). Specific Relief Act (47 of 1963), S.16(3) Suit for specific performance of contract Ready and willingness of plaintiff Continuous readiness and willingness at all stages from the date of agreement till date of hearing of suit must be proved".

(iii) Krishnasamy Naidu Vs. Ambrose, 1996 (1) M.L.J.566.

"If really the plaintiff was ready and willing to perform his part of the contract, there is no reason as to why he had not come forward with a suit for specific performance immediately after the period contemplated under the agreement and extended by the power of attorney of the first defendant expired".

(iv) Sandhyarani Vs. Sudha Rani, A.I.R.1978 S.C.537

"(D) Specific Relief Act (47 of 1963), S.16(b) and (c) Specific performance of contract -- Bars to relief Inordinate delay on the part of plaintiff to perform her part of contract - Decree for specific performance refused".

(v) K.S.Vidyanadam Vs. Vairavan 1997 (2) J.T.(S.C.)375 : (A.I.R.1997 SC 1751) (para 13)

"The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff".

14. In the decision reported in 1996 Law Weekly 1988 (Krishna Reddy, H.G., Vs. M.M.Thimmiah), in paragraph 26 (Page 101), the Honourable Division Bench has held as follows:

"S.16 (C) of the Specific Relief Act, 1963 is prohibitory and a duty is cast on courts by a public statute that specific performance of a contract cannot be granted in favour of a person unless he avers and proves his readiness and willingness to perform his part of the contract. That being the nature of the statute, it would be the duty of the Court to see whether the person who seeks to enforce the contract satisfies the mandatory provisions of S.16 of the Specific Relief Act, 1963. The Privy Council and the Supreme Court have interpreted the section to mean that if the conditions are not satisfied, the Court is bound to dismiss the suit".

15. In the decision reported in 1997 (2) C.T.C. 417 (Amirtham Vs. Subbian) a learned single Judge of this Court has laid down that the factum of readiness and willingness to perform the

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plaintiff's part of the contract has to be judged with reference to the conduct of the parties and attendant circumstances.

16. In 1997 (2) L.W. 820 (Vasantha and 3 others Vs. M.Senguttuvan), in paragraph 15 at page 825 it has been held as follows:

> "15. In A.I.R. 1967 - II - S.C.W.R. page 147 (Gomathinayagam Pillai and Others Vs. Palani swami Nadar), the Supreme Court held that in a suit for specific performance, plaintiff must prove readiness and willingness. The relevant portion of the said decision reads thus:
>
> > "The respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. AS observed by the Judicial Committee of the Privy Council in Ardeshir Mama Vs. Flora Sassoon: "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit."

Even if for a single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing. In this case, the concurrent finding is that the appellant was not ready to take the sale deed and that is proved by Ex.A-3."

17. In A.I.R. 1997 S.C. 1751 (K.S.Vidyanadam Vs. Vairavan) paragraph 13 reads as follows:

> "In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times

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- between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff".

18. The learned counsel for the respondent by relying on the decision reported in A.I.R.2004 Madras 457 (K.Majeed Vs. Pappa alias Madurambal and another) wherein it is observed as follows,

"As we have pointed out earlier, even after the reply notice dated 12.08.1983 (Ex.B-2) till the filing of the suit, there is a complete inaction on the part of the plaintiff and there is no evidence at all to show his readiness and willingness to perform his part of the contract. We hold that all the above factors would establish that the plaintiff has not proved that he was ready and willing to perform his part of the contract".

submitted that there is a complete inaction on the part of the plaintiff from 26.12.1990-the date of Ex.A-1-agreement till 28.09.1993-the date of Ex.A-2-notice and thereafter from 04.10.1993-the date of Ex.A-4-reply notice and 04.02.199-the date of filing of the suit. The learned counsel further submitted that though the compromise decree was passed as early as on 31.07.1991 and there was no impediment for getting the sale deed executed from the defendant the plaintiff issued Ex.A-2-notice only on 28.09.1993 and the delay in between the period has not at all been explained by acceptable evidence. The learned counsel further submitted that the plaintiff had entered into Ex.A-1-agreement fully knowing about the pendency of the partition suit and as such the contention of the learned counsel for the appellant that since the defendant had not been given a specific share on the date of the agreement the plaintiff did not take the sale deed cannot be accepted.

19. If in the light of the law laid down in the above said decisions the facts and circumstances established by evidence let in this case are considered, it has to be held that the plaintiff has not explained the inordinate delay during the above said periods as pointed out by the learned counsel for the respondent. As rightly contended by the learned counsel for the respondent even after the reply notice dated 04.10.1993 repudiating the agreement the plaintiff has waited till 04.02.1994 for filing the suit. At this juncture it has to be pointed out that the plaintiff and defendant are co-sharers and if really the plaintiff was having sufficient funds and was always ready and willing to perform his part of the contract he could have got the sale deed executed from his brother-the defendant herein and could have sought for allotment of that share also to his share in the final decree proceedings. Therefore the contention of the learned counsel for the appellant that only because of the pendency of the execution application filed by the plaintiff in the execution petition in the partition suit the sale was not completed is liable to be rejected.

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Even assuming that the plaintiff had enough means to complete the sale transaction that itself is not sufficient unless the plaintiff established that he was ready and willing to pay the balance sale consideration and complete the sale transaction right from the date of the execution till the date of decree. As laid down by the Apex Court the plaintiff has not proved his continuous readiness and willingness at all stages from the date of agreement till the date of hearing of the suit.

20. The learned counsel for the appellant is unable to point out any infirmity in the reasonings of the Courts below in arriving at the finding that the plaintiff has not proved his continuous readiness and willingness at all stages i.e., from the date of agreement till the date of hearing of the suit as laid down in the case of Thimmaiah and Others Vs. Ningamma and another reported in 2000 (7) S.C.C. 409 and (M.Nadar Kesavan Nadar Vs. Narayanan Nadar Kunjan Nadar) reported in 2000 (10) S.C.C. 244. When the findings of the courts below are based on evidence available on record and when the findings are not perverse, this Court while exercising power under Section 100 of the Code of Civil Procedure cannot interfere with the concurrent findings of the Courts below. As rightly pointed out by the learned counsel for the respondent no substantial question of law stands raised. Accordingly since no substantial question of law has arisen for consideration in the above second appeal and the same is dismissed. But however considering the relationship of the parties there will be no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

srk

To

1.The Sub-Court, Arni.

2.The Additional District Munsif, Arni.

1 cc to Mr.P. Valliappan, Advocate, sr. 52669
1 cc to MR.V. Raghavachari, Advocate, sr. 52533

Second Appeal No.308 of 2001

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